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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANATOLIS FOMINAS, 83-A-0516,

Petitioner,

-v-

DECISION AND ORDER
05-CV-0807A(Sr)

ELIOT SPITZER, Attorney General of New York,

Respondent.

Putative petitioner, Anatolis Fominas, has filed a petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, and has utilized the Court's approved form for filing a petition for a writ of habeas corpus relief pursuant to § 2254. He has also filed an application to proceed *in forma pauperis*. Petitioner, however, is not challenging his state court conviction which was rendered back in 1980 in Kings County, New York, but instead seeks assistance and protection from this Court based on what he claims are physical reprisals from inmates at the Wende Correctional Facility and a failure or refusal by Wende correctional officials to protect or assist him. While he seeks release from his immediate detention, his request appears to be based on his alleged unconstitutional treatment at Wende and not any constitutional infirmities in his state court conviction. Therefore, the Court can only properly construe this petition as a prisoner civil rights action under 42 U.S.C. § 1983, see *Chambers v. U.S.*, 106 F.3d 472, 475 (2d Cir. 1997)

(*Pro se* petitions should be characterized according to the relief sought, and not to the label given to them by *pro se* prisoners unlearned in the law), and hereby directs plaintiff to file by **January 4, 2006** the following:

(1) a complaint under 42 U.S.C. § 1983 on the Court's Prisoner Complaint Form and naming as defendants the individuals whom he claims are or have been involved in the alleged actions or inactions at Wende Correctional Facility, see, e.g., *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997) (In order to state a cognizable claim against an individual defendant, plaintiff must show that the defendant was personally involved in the alleged constitutional deprivation.); and

(2) a Prisoner Authorization Form pursuant to 28 U.S.C. § 1915(b).

If plaintiff fails to file both a complaint and prisoner authorization form by January 4, 2006, this action shall be dismissed with prejudice without further order of the Court. Upon receipt of the plaintiff's complaint and prisoner authorization form, the Court will review the complaint as required pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

IT HEREBY IS ORDERED, that plaintiff's motion to proceed *in forma pauperis* is granted;

FURTHER, that the petition is recharacterized and construed as a complaint pursuant to 42 U.S.C. § 1983, and plaintiff must file a both complaint as directed above on the Court's Prisoner Complaint Form and a prisoner authorization form by **January 4, 2006**;

FURTHER, that the Clerk of the Court is directed to send to plaintiff with this order a copy of the original petition, a blank § 1983 complaint form, the instructions for preparing a complaint, and a prisoner authorization form;

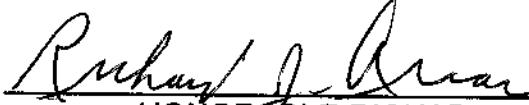
FURTHER, that in the event plaintiff fails to file a complaint and prisoner authorization form as directed above by **January 4, 2006**, this action shall be dismissed with prejudice without further order of the Court;

FURTHER, that in the event this action is dismissed because plaintiff has failed to file a complaint and prisoner authorization form by **January 4, 2006**, the Clerk of the Court shall close this case as dismissed without prejudice without further order; and

FURTHER, that in the event the complaint is dismissed because plaintiff has failed to file an amended complaint by **January 4, 2006**, the Court hereby certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed on motion to

the United States Court of Appeals for the Second Circuit in accordance with
Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.


HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: Dec. 9, 2005